For these reasons the State Government continues to work towards the development of a policy and possible amendments to the *Conservation and Land Management Act 1984* (WA) , which might enable joint management arrangements on conservation and Aboriginal-held lands, irrespective of the status of native title.

The management of the State's conservation lands and waters by the Department of Environment and Conservation (DEC) is providing new training and employment opportunities for Aboriginal people throughout the State.

Partnerships with Aboriginal communities demonstrate a commitment to work together with Aboriginal people to achieve long-term, sustainable outcomes for Aboriginal people and also for conservation, particularly in the booming Kimberley region.

The State Government, through DEC, will continue to work closely with other Government and non-Government organisations to ensure its training and employment strategies contribute towards the process of reconciliation and the recognition by natural resource managers that Aboriginal people have much to offer.

Case Note

Gudjala People 2 v Native Title Registrar [2007] FCA 1167

By Tran Tran, Research Officer, NTRU

Registration is the preliminary threshold that must be satisfied before claimants can advance a native title claim. In order to be registered, parties need to satisfy both section 190B, which deals mainly with the merits of the claim and section 190C, which deals with procedural and other matters. The *Gudjala People 2 v Native Title Registrar*[1] decision involved an application for review of a decision by the Native Title Registrar not to accept an application for registration. In reaching his decision, Justice Dowsett considered the requirements of the NTA to register a decision. His Honour focused on the content of the application and in particular:

- how the persons in the native title claim group are named in the application; or whether the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.[2]
- Whether the description or list of the claim group is sufficient to allow the native title rights and interests claimed to be readily identified.
- Whether the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular:
    - that the native title claim group have, and the predecessors of those persons had, an association with the area; and
    - that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;
    - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.; and
    - that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by the Crown, statutory authority or lease holder.

The claimants argued that:

> the fact that their application satisfied the Delegate in 2005 with respect to the same group, for the same country with the same traditional laws and customs represented by the same individuals as Applicant contributes to the unfairness of the decision that in the following

[1] [2007] FCA 1167.

[2] NTA, s 62(2)(d).

> year – without reference to a cogent or relevant reason for a changed opinion and on erroneous bases, the decision was that the registration test conditions were not satisfied.[3]

However, Dowsett J said that the Registrar was bound by their statutory duty rather than a previous decision. He noted that 'the decision to accept or reject an application is a purely administrative function, the decision depending upon whether or not such application satisfies the prescribed criteria'.[4] His Honour rejected the idea that 'because of the previous acceptance of Core Country Claim [which involved the same claimants and a similar factual scenario] such an obligation may have arisen'.[5] Further he noted that even though there may be an error in decision making this may not necessarily deny the applicant procedural fairness. Dowsett J noted that the role of the Registrar is administrative and concluded that the obligation to refer to a salient fact is beyond the scope of this role.

His Honour went on to consider the areas that were not satisfied, namely s 62(e), 190B(5) and subs 190B(3), the identification of the claim group and 190B(7), physical connection. In terms of the identification of the claim group the parties had submitted that membership was determined based on physical, spiritual and religious association, genealogical descent and processes of succession and then proceeded to list apical ancestors of which, the 'native title claim group is comprised of all persons descended from'.[6] Justice Dowsett questioned the logic of this description:

> it is curious that laws and customs concerning physical, spiritual and religious association, genealogical descent and processes of succession should lead to the outcome that only people who have 'communal native title' in the area are the descendants of four apical ancestors. One would have thought it more likely than not that some such descendants, although satisfying the laws relating to genealogical descent, would fail in connection with physical, spiritual and religious association and/or processes of succession.[7]

Justice Dowsett found that even though membership of the claim group was asserted there was no evidence of the traditional laws and customs upon which membership was to have been was based. His Honour did not encourage this approach but found that it was sufficient that the group was adequately identified by reference to apical ancestors. This suggests that when providing a description of the claim group claimants should opt to provide one accurate description rather than two potentially conflicting descriptions that may be rejected by the Registrar. More importantly Justice Dowsett noted that:

> In some cases it will be convenient to describe the claim group by referring to particular people, either by name or, as in this case, by reference to apical ancestors. In other cases, it may be done by describing the relevant requirements of law and custom which must be satisfied in order that a particular person share in the claimed rights and interests. Identification of the claim group, the claimed rights and interests and the relationship between the two are not totally independent processes.[8]

His Honour proceeded to consider whether the claimants had shown that there was an association with the claim area. In particular, His Honour considered the principles of *Yorta Yorta* noting the legal principles that arose from that case. After considering the factual basis for claimed Native Title His Honour concluded that the overlaps in the claim area were not adequately explained and that the application had failed to explain how, by reference to traditional law and customs presently acknowledged and observed, the claim group is limited to descendants of the identified apical ancestors. Dowsett J also noted that no basis was shown for inferring that there was, at and prior to 1850-1860, a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group. His Honour ultimately found that the claim should not be accepted for registration.

[3] [13].
[4] [15].
[5] [15].
[6] [28].
[7] [33].
[8] [41]